BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

GLORIA T. VIALOVOS
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-144
Case No. 72-1384

S.S.A. No.

ROSS & BROWN PAPER BOX COMPANY
(Employer)

Employer Account No. ---

The employer appealed from Referee's Decision No. ONT-13376 which held that the claimant was not disqualified for benefits under section 1256 of the Unemployment Insurance Code and that the employer's account is not relieved of benefit charges under section 1032 of the code.

STATEMENT OF FACTS

The claimant worked for the above mentioned paper box manufacturing company for about ten years at a final wage of $1.65 an hour as a stocker, spotter, lidder, helper and stacker. On December 9, 1971 she voluntarily left that work under the following circumstances.

During the Summer of 1971 the employer installed a new boxing machine in an unheated building containing a cement floor, adjacent to the building where the claimant normally worked. The claimant had worked on this machine twice during that summer. On December 9, 1971 at about 10 a.m. the claimant and three other female employees were ordered to work on that machine. They visited the area and refused to operate the machine for the reason

that it was too cold to work in the building where the machine was located. While visiting the area the claimant's extremities became extremely cold. She was also suffering from a cold on that day. Shortly thereafter the employer called a meeting and the claimant and other employees were told that starting the next day they were expected to work on that machine, and that they should come to work in appropriate clothing so that such work could be done. They were told that if they failed to comply with this instruction it would be assumed that they were quitting their jobs.

The employer testified at the referee hearing that the temperature of the building on December 9, 1971 where the machine in question was located "was probably chilly to where it would numb your feet and hands." The claimant's supervisor was instructed by the employer to rotate the girls who were to work on the machine so that they did not work on it more than an hour. In this way the girls would not be exposed to the cold for too long a period, and, also, a number of girls would become familiar with the operation of the machine.

Instead of waiting to the next day, the claimant was ordered to operate the machine in question at about 1 p.m. on December 9, 1971. The claimant refused because of the cold temperature of the building and because of the inadequate clothing she was wearing to ward off the cold. The claimant protested this order to her supervisor and to the employer. The employer offered a jacket to the claimant to wear for warmth. The claimant refused the jacket because it would not warm her extremities. The claimant asked permission to go home to get warmer clothing. Permission was refused. The employer stated to the claimant that he assumed that if she did not comply with the order she was quitting. The claimant refused to comply. A termination slip was then prepared for the claimant.

On January 11, 1972 the employer was inspected by the Division of Industrial Welfare and was advised by that division that the problem of heating in the area where the claimant was asked to work would have to be corrected if female employees were to work there, whether on a regular or occasional basis, since the

condition of the building was in violation of subdivision (a) of section 23, Industrial Welfare Commission Order No. 1-68, which provides:

> "The temperature maintained in each workroom shall provide reasonable comfort consistent with accepted standards for the nature of the process and the work performed."

On January 21, 1972 the employer wrote a letter to the division stating that it complied with the division's request by installing two heaters in the building in question.

Two documents are attached to the employer's appeal to this board. It is apparent that those documents were available on January 28, 1972, the date of the referee hearing. No justification has been presented as to why these documents were not offered as evidence at the referee hearing.

REASONS FOR DECISION

Section 1256 of the code provides that an individual is disqualified for benefits, and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of benefits charges if the claimant left his most recent work voluntarily without good cause, or if he has been discharged for misconduct connected with his most recent work.

In determining whether there has been a voluntary leaving or a discharge under section 1256 of the code, it must first be determined who was the moving party in terminating the employment relationship. If the claimant left employment while continued work was available, then the claimant is the moving party. If the employer refuses to permit an individual to continue working although the individual is ready, willing and able to do so, then the employer is the moving party. (Appeals Board Decision No. P-B-37)

In the instant case the employer did not refuse to permit the claimant to work and the claimant was not ready, willing and able to work. The facts do not therefore present an issue of discharge. The facts of this case demonstrate an unwillingness on the part of the claimant to work while continued work was available. The issue before us is therefore a voluntary leaving of work.

There is good cause for the voluntary leaving of work where the facts disclose a real, substantial and compelling reason of such nature as would cause a reasonable person genuinely desirous of retaining employment to take similar action. (Appeals Board Decision No. P-B-27)

Good cause is a relative term and must be decided according to the facts and circumstances of each particular case. The mere advancing of an excuse is not sufficient to constitute good cause. There must be a substantial or compelling reason, as distinguished from an imaginary pretense, for the action taken upon which good cause is to be found.

Good cause exists for leaving work where working conditions become intolerable because the physical facilities at work are such as to endanger the health, safety or comfort of the employees, or such facilities violate the law and the employer has had a reasonable opportunity to correct the situation after knowledge of its existence. (See Appeals Board Decision No. P-B-8)

In the instant case the claimant had no mere excuse or imaginary pretense for leaving her work. The claimant experienced the coldness of the place she was ordered to work and the employer admitted that it was cold enough there to numb the feet and hands. This was also a reason for not allowing the employees to work the machine for more than one hour. The claimant exercised due diligence under the circumstances in that she refused to work the machine only after she explained to the employer that she was not properly clothed, and after she had been refused permission to go home to obtain appropriate warm clothing to do the work assigned.

In our judgment the conditions under which the claimant was being ordered to work were intolerable in that her health, safety or comfort would have been endangered by performing such work. The fact that the working conditions were found to be in violation of law is supportive of this conclusion.

Since the claimant was faced with the alternative of doing the assigned work "now" and thereby endanger her health, safety or comfort or quit, in quitting she did what a reasonable person genuinely desirous of retaining employment would have done under similar circumstances. The claimant therefore left her work with good cause.

In reaching our decision in this case we have not given consideration to the two documents the employer attached to the appeal to this board. To do otherwise would not only be highly prejudicial to the claimant who appeared before the referee, but also would be in violation of fundamental constitutional principles of due process and the rights of the parties to a fair hearing. The employer was afforded the opportunity to appear at the referee hearing to offer testimony, to examine and cross-examine the parties present and their witnesses, and to present its own evidence in such a manner that the right of refutation, examination and cross-examination could have been properly offered the claimant. In failing to present the two documents, which were available at the time of the referee hearing and which should have been presented at that hearing, the employer cannot at this late date be heard to complain of the possible consequences that these documents might have on the result of the case. (section 5109, Title 22, California Administrative Code)

DECISION

The decision of the referee is affirmed. The claimant is not disqualified for benefits under section 1256 of the code. The employer's reserve account is not relieved of benefit charges under section 1032 of the code.

Sacramento, California, July 27, 1972

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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